No. 3087

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CIRO CONETTO,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

NATHAN C. COGHLAN,
Attorney for Plaintiff in Error.

BERNAU-WALSH PRINTING CO.

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Statement of the Case.

Plaintiff in error and one Alfonzo Conetto were indicted in the District Court of the United States of America, in and for the Southern District of Florida, on February 21st, 1917, for the violation of Section 29b (1) of the Bankruptcy Act of 1898. The plaintiff in error was thereafter arrested in the Northern District of California and, after a hearing before the Honorable Francis Krull, United States Commissioner for the Northern District of California, at San Francisco, on the 15th day of September, 1917, was remanded to the custody of the United States Marshal for said Northern District of California to abide the order of the Judges

of the District Court of the United States for said District (Tr. pp. 3, 4). Thereafter on the 29th day of September, 1917, an order and warrant of removal was made and entered by the Honorable William C. Van Fleet, Judge of the said District Court, directing the said Marshal to deliver plaintiff in error into the custody of the Marshal of the United States for the Southern District of Florida.

At the hearing before the said Commissioner the Government introduced a certified copy of the indictment found and returned by the Grand Jurors of the United States of America, in and for the said Southern District of Florida (Tr. pp. 6-21) and, upon the hearing before the said District Court, it was stipulated that said indictment constituted all the evidence adduced before the said Commissioner and that the commitment and order of said Commissioner (Tr. pp. 3, 4, 5) were based solely and exclusively upon said copy of the indictment, except that the identity of the plaintiff in error was admitted (Tr. p. 21).

The said commitment, order and indictment also constituted all the records and evidence adduced upon the hearing before the said District Court (Tr. p. 21) and the order and warrant of removal are based solely and exclusively upon the said commitment, order and indictment. The said commitment and order being based entirely upon the indictment (except as to the identity of the plain-

tiff in error, which is conceded), this argument will be confined to a discussion of two questions:

(1) Where an indictment, which is the sole basis upon which a removal is sought, fails to charge an offense and should be quashed for uncertainty, the District Court has no jurisdiction to permit or to order the removal of a prisoner.

(2) The indictment in this case does not charge plaintiff in error with an offense against the United States and should be quashed for uncertainty.

The indictment contains six counts, which are identical in language, except as to the several descriptions of the merchandise alleged to have been concealed, and we will, therefore, confine the argument to the first count and refer to it for convenience as "the indictment." The indictment in full is set forth in the Transcript, pages 6 to 21. The first count thereof reads as follows:

> "That on, to wit, December 5th, 1916, in the district aforesaid and within the jurisdiction of this Court, Ciro Connetto and Alfonzo Connetto, co-partners trading and doing business as C. Connetto & Brother, filed a voluntary petition in bankruptcy; that thereafter, on, to wit, December 6th, 1916, the said Ciro Connetto and Alfonzo Connetto, trading as aforesaid, were duly adjudicated bankrupts within the meaning and purview of the act of Congress of the United States of America; that thereafter regular proceedings for the administration of said bankrupt estate were had and that Maxwell Baxter having been duly assigned as trustee in bankruptcy for the estate of said

Ciro Connetto and Alfonzo Connetto, trading as aforesaid, and that thereafter, on to wit, January 6, 1917, the said Maxwell Baxter so having been duly designated as trustee of said estate as aforesaid then and there duly qualified as such trustee and entered into a bond as such trustee, which said bond was thereafter duly approved by T. M. Shackleford, Jr., the said T. M. Shackleford, Jr., then and there being a Referee in Bankruptcy for said district; that after the filing of the said voluntary petition in bankruptcy and after the said Ciro Connetto and Alfonzo Connetto, trading as aforesaid, had been duly adjudicated a bankrupt, but before the appointment and qualification of said Maxwell Baxter as trustee in said bankruptcy proceedings, the said Ciro Connetto and Alfonzo Connetto unlawfully and fraudulently did conceal certain property belonging to the said estate in bankruptcy of them, the said Ciro Connetto and Alfonzo Connetto, trading as aforesaid and bankrupt as aforesaid, which said property consisted of and was in fact, to wit: Fifteen (15) cases of certain merchandise known and described as canned tomatoes the same then and there being tomatoes put up and sealed ready for sale in tin cans and the same then and there being packed or enclosed in wooden cases or boxes, the said tomatoes then and there bearing the brand and being known as Castle Haven tomatoes, a further description of said goods being to the grand jurors unknown; that the said merchandise above described in fact belonged to the bankrupt estate of them, the said Ciro Connetto and Alfonzo Connetto, trading as aforesaid, and was in their possession and under their control, and was concealed as aforesaid within the Southern District of Florida, to wit, December 5th, 1916, by them, the said Ciro Connetto and Alfonzo Connetto, and that

thereafter, after the qualification of the said Maxwell Baxter as trustee by giving bond as aforesaid, the said Ciro Connetto and Alfonzo Connetto have not, nor have either of them disclosed to the said Maxwell Baxter the possession by them, the said Ciro Connetto and Alfonzo Connetto, of the said merchandise above described, and did not and have not turned over and delivered to the said Maxwell Baxter, trustee as aforesaid, the said merchandise as above described, or accounted to him for the same; that at the time of concealment by them, the said Ciro Connetto and Alfonzo Connetto of the said merchandise above described, to wit, fifteen (15) cases of Castle Haven tomatoes above described, the same in fact belonged to the bankrupt estate of them, the said Ciro Connetto and Alfonzo Connetto, trading as aforesaid as they, the said Ciro Connetto and Alfonzo Connetto, then and there well knew, that no accounting has up to this date been made to the said Maxwell Baxter, trustee, of and for the said 15 cases of Castle Haven tomatoes above described; contrary to the form of the statute of the said United States in such case made and provided and against the peace and dignity of the United States of America."

Specifications of Error.

I.

That the Court erred in ordering the United States Marshal for the Northern District of California to take the body of Ciro Conetto and deliver him into the custody of the Marshal of the United States, for the Southern District of Florida.

II.

That the Court erred in holding that it had jurisdiction to issue a warrant of removal herein.

III.

That the Court erred in holding that the indictment, on which said application for the removal of the plaintiff in error was based, set forth facts sufficient to constitute a public offense.

IV.

That the Court erred in holding that there was probable cause to believe plaintiff in error guilty as charged in the indictment.

V.

That the Court erred in holding that the allegations contained in said indictment were sufficient in law to justify the granting and issuing of a warrant of removal.

VI.

That the Court erred in holding that said indictment charged plaintiff in error with an offense against the laws of the United States.

VII.

That the Court erred in refusing to hold that the said indictment was in substance uncertain in the following respects:

(a) Because it cannot be ascertained therefrom whether or not the plaintiff in error is or ever has been adjudicated a bankrupt.

(b) Because it cannot be ascertained therefrom whether or not a trustee in bankruptcy is or ever has been appointed for any estate in bankruptcy of the said Ciro Conetto.

(c) Because it cannot be ascertained therefrom whether or not the said Ciro Conetto, while a bankrupt, or after his discharge, concealed from his trustee in bankruptcy any of the property belonging to his estate in bankruptcy.

(d) Because it cannot be ascertained therefrom whether or not any of the alleged assets of the alleged bankrupt estate were ever concealed from the alleged trustee in bankruptcy.

VIII.

That the Court erred in its rulings as to the first, second, third, fourth, fifth and sixth counts of said indictment, and each of them, in the same respects herein alleged as to said indictment.

Brief of the Argument.

I.

Where an indictment, which is the sole basis upon which a removal is sought, fails to charge an offense and should be quashed for uncertainty, the

District Court has no jurisdiction to permit or to order the removal of a prisoner.

Section 1014, Rev. Stat.;
In re Buell, 3 Dill. 116, Fed. Cas. No. 2102;
In re Terrell, 51 Fed. 213;
U. S. v. Conners, 111 Fed. 734;
Stewart v. U. S., 119 Fed. 89;
Beavers v. Henkel, 194 U. S. 73, 83;
Tinsley v. Treat, 205 U. S. 20.

II.

The indictment in this case does not charge the plaintiff in error with an offense against the United States and should be quashed for uncertainty.

Sec. 29b (1) of Bankruptcy Act;
Sec. 1a (4) of Bankruptcy Act;
Sec. 1a (19) of Bankruptcy Act;
Sec. 5a of Bankruptcy Act;
In re Bertenshaw, 157 Fed. 363, 85 C. C. A. 61;
In re Hansley and Adams, 228 Fed. 564;
In re McMurtrey, 142 Fed. 853;
In re Mercur, 122 Fed. 384;
Field v. United States, 137 Fed. 6;
Meyers v. United States, 200 Fed. 822;
Johnson v. United States, 163 Fed. 30;
In re M'Crea, 161 Fed. 246.

The Argument.

I.

WHERE AN INDICTMENT, WHICH IS THE SOLE BASIS UPON WHICH A REMOVAL IS SOUGHT, FAILS TO CHARGE AN OFFENSE AND SHOULD BE QUASHED FOR UNCERTAINTY, THE DISTRICT COURT HAS NO JURISDICTION TO PERMIT OR TO ORDER THE REMOVAL OF A PRISONER.

In this connection we will consider Specifications of Error, Numbers 1, 2, 3, 4 and 5, and Assignment of Errors, Numbers 1, 2, 3, 6 and 9 (Tr. pp. 31, 32, 33).

The removal of a prisoner from one district within the United States to another district is governed by Section 1014 of the Revised Statutes, which provides:

> "For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is

> committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

This section has been construed in many cases, and it has been held universally that the act of a district judge in ordering the removal of the prisoner is not a ministerial act, but involves the exercise of a judicial discretion. It is the duty of the judge, therefore, to determine in each case that sufficient cause exists for the removal of the prisoner, and where, as in the case at bar, the finding of the commissioner that probable cause exists is based solely and entirely upon a copy of the indictment, it becomes the duty of the district judge, before issuing a warrant of removal, to inquire into the sufficiency of the indictment, and, if the indictment, fails to charge the prisoner with an offense against the United States or should be quashed for uncertainty, no warrant of removal should issue and the prisoner should be discharged.

The reason for this rule is ably set forth by Circuit Judge Dillon in the following language:

> "It is argued that the question of the sufficiency of the indictment is for the Court in which it was found, and not for the district judge on such application. I cannot agree to this proposition in the breadth claimed for it in the present case. This provision devolves upon a high judicial officer of the government a useful and important duty. In a country of

such vast extent as ours, it is no light matter to arrest a supposed offender, and, on the mere order of an inferior magistrate, remove him hundreds, it may be thousands, of miles for trial. The law wisely requires the previous sanction of the district judge to such removal. Mere technical defenses to an indictment should not be regarded; but the district judge who should order the removal of a prisoner, when the only probable cause relied on or shown was an indictment, and that indictment failed to show any offense against the laws of the United States, or showed the offense not committed or triable in the district to which the removal is sought, would misconceive his duty, and fail to protect the liberty of the citizen."

In re Buell, 3 Dill. 116, Fed. Cas. No. 2102.

In re Terrell, 51 Fed. 213, the removal of a prisoner was sought upon an indictment found in the District Court of the United States for the District of Massachusetts. In discussing the provisions of Section 1014 of the Revised Statutes, the Court said:

"It is not disputed by the district attorney that it is not only the right, but the duty, of the district court, before ordering removal to look into the indictment, so far as to be satisfied that an offense against the United States is charged, and that it is such an offense as may lawfully be tried in the forum to which it is claimed the accused should be removed; and the same right and duty arises upon habeas corpus, whether the petitioner is held under the warrant of removal issued by the district judge whose decision is thus reviewed, or under the warrant of the commissioner to await the

> action of the district judge. * * * There is good cause for holding that this power should be exercised liberally, whenever the judge before whom the questions are raised, on application for a warrant of removal, or on habeas corpus, is satisfied, *from the face of the indictment, that were such indictment before him for trial, and demurred to, he would quash it.* This is a country of vast extent, and it would be a grave abuse of the rights of the citizen if, when charged with alleged offenses committed perhaps in some place he had never visited, he were removable to a district thousands of miles from his home, to answer to an indictment fatally defective, on any mere theory of a comity which would require the sufficiency of the indictment to be tested only in the particular court in which it is pending." (Italics ours.)

In the case of U. S. v. Conners, 111 Fed. 734, the Government sought to remove a prisoner from the State of Oregon to the Northern District of California, a very short distance indeed in comparison with the distance in the case at bar, to wit, from the State of California to the State of Florida. In that case the *prisoner consented to the removal* but the Court refused to make the order and Bellinger, D. J., said: . .

> "The petition for removal is not resisted by defendant, and the suggestion was made in the application that the order prayed for in the petition was agreeable to his wishes. But this can make no difference. There can be no order of removal upon consent of the party whose removal is sought, where the facts charged in the indictment do not constitute a crime."

Another case, in which the removal of a prisoner was sought and the question before the Court was the sufficiency of the indictment, is the case of Stewart v. United States, (C. C. A.) 119 Fed. 89, and the Court, holding that the indictment was bad in substance and that it should also be quashed for uncertainty, ordered the defendant discharged.

This same question has been considered by the United States Supreme Court and the decisions in that tribunal also sustain the plaintiff in error on this point. In discussing this question the learned Mr. Justice Brewer said:

> "It may be conceded that no such removal should be summarily and arbitrarily made. There are risks and burdens attending it which ought not to be needlessly cast upon any individual. These may not be serious in a removal from New York to Brooklyn, but might be if the removal was from San Francisco to New York. And statutory provisions must be interpreted in the light of all that may be done under them. We must never forget that in all controversies, civil or criminal, between the government and an individual, the latter is entitled to reasonable protection. Such seems to have been the purpose of Congress in enacting Sec. 1014 Rev. Stat. (U. S. Comp. Stat. 1901, p. 716), which requires that the order of removal be issued by the judge of the district in which the defendant is arrested. *In other words, the removal is made a judicial rather than a mere ministerial act.*" (Italics ours.)
>
> Beavers v. Henkel, 194 U. S. 73, 83.

This language is quoted with approval in the case of Tinsley v. Treat, 205 U. S. 20, and Mr.

Chief Justice Fuller, in discussing the effect of an indictment in a removal proceeding, said:

> "We regard that question as specifically presented in the present case, and we hold that the indictment cannot be treated as conclusive under Sec. 1014."

II.

THE INDICTMENT DOES NOT CHARGE THE PLAINTIFF IN ERROR WITH AN OFFENSE AGAINST THE UNITED STATES AND SHOULD BE QUASHED FOR UNCERTAINTY.

The indictment attempts to charge the plaintiff in error with the crime of concealing property belonging to his estate in bankruptcy from his trustee in bankruptcy, in violation of the provisions of Section 29b (1))of the Bankruptcy Act of 1898, which provides that:

> "A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently concealed, while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy."
>
> (30 Stat. L. 554).

It is the contention of the plaintiff in error that the indictment does not allege that *he* was ever adjudicated a bankrupt or that a trustee was ever appointed for *his* estate in bankruptcy, but that the indictment attempts to allege that *C. Connetto & Brother, a co-partnership,* was adjudicated a bankrupt and that a trustee was appointed for *its*

estate in bankruptcy, and that property was concealed from *its* trustee. Before entering into a discussion of the allegations of the indictment, it may be well to ascertain the status of a partnership under the Bankruptcy Act.

THE PARTNERSHIP IS A LEGAL ENTITY, DISTINCT FROM THE INDIVIDUALS COMPOSING IT.

The word "bankrupt," as defined by the Act,

> "shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt." Sec. 1a (4).
>
> "'Persons' shall include corporations, except where otherwise specified, and officers, partnerships, and women, * * *." Sec. 1a (19).

Section 5a of the Bankruptcy Act provides that:

> "A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt."

Under these provisions, the partnership is a "person," and may be adjudicated a bankrupt, irrespective of whether or not the individual members thereof are adjudicated bankrupts. The partnership may be insolvent or be adjudicated a bankrupt when one of the partners has died, or where one of the partners is an infant, or where one partner is insane, or where one of the partners is solvent, or where all of the individual partners

are solvent, in which cases it would be impossible to have one or more of the individual members adjudicated bankrupts.

The status of a partnership as a legal entity and the distinction between the *partnership* and the individual members thereof is clearly pointed out in an able and exhaustive opinion by Circuit Judge Sanborn in re Bertenshaw, 157 Fed. 363, 85 C. C. A. 61.

In re Hansley and Adams, 228 Fed. 564, Adams, one of the partners, filed a petition to have the partnership and himself declared bankrupts. The district judge made an order that "the said Hansley & Adams, a co-partnership, is hereby declared and adjudged a bankrupt accordingly."

Hansley later moved to vacate the above order and, denying the motion, Trippett, District Judge, said:

> "This is not an adjudication that the members of the partnership are bankrupt.
>
> "Hansley now moves the court to vacate the adjudication on the ground that there has been no order adjudicating H. A. Hansley and J. E. Adams bankrupts. The contention is made that the partnership cannot be adjudged bankrupt without, at the same time, adjudging the individual members of the partnership bankrupts.
>
> "That statute provides that a partnership may be declared bankrupt. A partnership is an entity to that extent. The statute does not impose the condition that the partners shall be declared bankrupt at the same time as the partnership. It is plain that the partnership

> may be declared a voluntary or involuntary bankrupt. There is no limitation in the statute in this regard. It is well settled that one partner may petition to have the partnership declared a voluntary bankrupt. * * * The language of the statute does not justify an inference that Congress meant that partnership could not be declared bankrupt without adjudication of the partners to be bankrupt."

In re McMurtrey, 142 Fed. 853, it was held that a partnership is insolvent and subject to adjudication as a bankrupt when the partnership property is insufficient to pay its debts, regardless of the individual property of the partners.

In re Mercur, 122 Fed. 384, the Court held that where members of the firm have been adjudicated bankrupts, but the *partnership has not,* the trustee appointed in the individual cases has no authority to interfere with the firm assets.

The indictment does not allege that Ciro Connetto, the plaintiff in error, has ever been adjudged a bankrupt, but attempts to allege that *C. Connetto & Brother, a co-partnership,* was adjudged a bankrupt; that a trustee was appointed for *its* estate, and that the property was concealed from *its* trustee. It must be evident that it is impossible for any person other than the *bankrupt* to commit the offense itself.

In the case of Field v. United States, 137 Fed. 6, the plaintiff in error was *not a bankrupt,* but was the vice-president of a bankrupt corporation. He was indicted and convicted under Sec. 29b.

After quoting Sec. 1, cl. 19, of the Bankruptcy Act, which defines "persons," the Court said:

> "A careful reading of this clause, however, in connection with the terms of Section 29b, convinces me that it can have no effect to extend the terms or broaden the true interpretation of the latter subsection. All, who are punishable under Section 29b, are persons who are or who have been bankrupts. Hence none of those whom the word "persons" is made to include under Section 1, cl. 19,—no officers, partnerships, women, participants in forbidden acts, agents, officers, or members of any board of directors or trustees—can be guilty of the offense specified in this subsection, unless they are either bankrupts when they concealed the property, or have been such and have obtained their discharges before that time. *Present or past bankruptcy is an essential attribute of every person who may be an offender under this statute.*" (Italics ours.)

The indictment does not attempt to allege that Ciro Conetto *as an individual* has ever been adjudicated a bankrupt, or that a trustee has ever been appointed for *his* estate in bankruptcy, or that the assets of *his* bankrupt estate were concealed. The indictment alleges that "Ciro Connetto and Alfonzo Connetto, co-partners trading and doing business as C. Connetto & Brother, filed a voluntary petition in bankruptcy; that thereafter, on, to wit, December 6th, 1916, the said Ciro Connetto and Alfonzo Connetto, trading as aforesaid, were duly adjudicated bankrupts * * *; that thereafter regular proceedings for the administration of said bankrupt estate were had and that Maxwell Bax-

ter having been duly designated as trustee in bankruptcy for the estate * * *"; and the indictment continues to refer to *"a bankrupt,"* "estate in bankruptcy," always using the singular. (Tr. pp. 6, 7, 8.) Although the indictment is not altogether clear and should be held void for uncertainty, the inference, if any can be drawn, is that the *partnership,* and not the individual members thereof, was the bankrupt, Maxwell Baxter was *its* trustee, and the property referred to was the property of *its* bankrupt estate.

In re Meyers, 96 Fed. 408, two members of a firm had filed separate petitions in bankruptcy and had been adjudicated bankrupts. The partnership was not adjudicated a bankrupt and no application in that behalf was made. An application for discharge by the individual members of the partnership was denied on the ground that a trustee for the firm should be appointed to collect firm assets. The trustees for the individual members could only collect assets of the individual estates and neither trustee represented the partnership. In referring to Section 29b of the Bankruptcy Act the Court said:

> "In individual proceedings like these, a concealment of firm assets would not fall within Section 29b, because firm assets do not belong to the individual estate; and this individual estate is all that either trustee in these proceedings represented."

In the case at bar Maxwell Baxter was the trustee of the bankrupt estate of *the partnership* and not

of the plaintiff in error. It would be impossible, therefore, under Section 29b, for the plaintiff in error to be guilty of concealing the assets of the bankrupt estate of *the partnership* from *its* trustee in bankruptcy. In order to directly charge an offense under this section the indictment must contain allegations averring that the plaintiff in error, while *he* was a bankrupt or after his discharge, concealed property of *his bankrupt estate* from *his* trustee in bankruptcy.

THE INDICTMENT DOES NOT CHARGE A CONCEALMENT FROM THE TRUSTEE.

It is alleged in the indictment that

> "before the appointment the qualification of said Maxwell Baxter as trustee * * * the said Ciro Connetto and Alfonzo Connetto unlawfully and fraudulently did conceal certain property" (Tr. p. 7).

There is no allegation that the said Conetto *continued* to conceal said property or that they ever *concealed said property from said trustee.* There is an allegation that,

> "after the qualification of said Maxwell Baxter as trustee * * *, the said Ciro Connetto and Alfonzo Connetto have not * * * disclosed to the said Maxwell Baxter the possession * * * of the said merchandise above described, and did not and have not turned over and delivered to the said Maxwell Baxter * * * the said merchandise as above described, or accounted to him for the same."

The specific allegation is that the *concealment took place before* the appointment of the trustee.

While it may be conceded that where property is concealed prior to the appointment of a trustee, and the concealment continues after such appointment, it is a concealment from the trustee, nevertheless one of the essential elements of the offense is the *concealment from the trustee,* and the failure to directly and specifically allege a concealment from the trustee renders the indictment invalid. The Act does not make it a crime to *conceal property prior* to the appointment of a trustee, or to *fail to disclose* the possession of property, or to *fail to account* to the trustee, or to fail to *turn over and deliver* property to the trustee. It is necessary that there be a *concealment.*

Assuming that the Government should prove everything charged in the indictment in this connection, to wit:

(1) the concealment prior to the appointment of a trustee, and

(2) the failure to disclose the possession of the property to the trustee, and

(3) the failure to account to the trustee, and

(4) the failure to turn over and deliver the property to the trustee,

the bankrupt would not be guilty of *concealing* property from the trustee. The property in question may have come into the possession of the

trustee immediately after his appointment or even prior thereto. These elements may or may not be included in a concealment. The bankrupt might fail to *account* and to *deliver* and to *turn over* and to *disclose* the property to the trustee, and yet the property could be in the actual possession of the trustee, or, negligently or otherwise, in the possession of a third person. A similar situation existed in the case of Meyer v. United States, 200 Fed. 822. The concealment occurred prior to the appointment of a trustee, but in that case after alleging the concealment *prior* to the appointment of a trustee, the indictment contained an allegation that the defendant "did then and there continue to conceal * * * from his said trustee." But no such allegation is contained in this indictment.

> "The offense is not making a misrepresentation at a given time and place; it is the continuous concealment of the property from the trustee during the whole course of the proceedings and beyond."
>
> Johnson v. United States, 163 Fed. 30.

There is but one more defect in the indictment to which the Court's attention should be directed, i. e., that there is no allegation as to the value of the property referred to or that it is of any value whatsoever. In re M'Crea, 161 Fed. 246, it was held that a bankrupt is not guilty of making a false oath when he omits from his sworn schedule securities which are absolutely worthless, and it must follow that it would be no crime to conceal property which had no value.

In conclusion, we submit that the indictment fails to allege that the plaintiff in error has ever been adjudicated a bankrupt, or that there has ever been a concealment from the trustee, or that plaintiff in error has ever concealed *while a bankrupt,* or after his discharge any property belonging to *his* bankrupt estate from *his* trustee in bankruptcy.

It is respectfully submitted that the order and warrant of removal should be set aside and the plaintiff in error discharged.

Dated, San Francisco,
February 11, 1918.

NATHAN C. COGHLAN,
Attorney for Plaintiff in Error.